

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 91-01057 CW

JUDI BARI, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER DENYING
PLAINTIFF CHERNEY'S
RENEWED MOTION TO
STRIKE (Docket No.
678); GRANTING
DEFENDANT UNITED
STATES'S MOTION FOR
DE NOVO REVIEW
(Docket No. 673);
OVERRULING DEFENDANT
UNITED STATES'S
OBJECTIONS TO
MAGISTRATE JUDGE'S
ORDER (Docket No.
673); AND GRANTING
CHERNEY'S REQUEST
FOR ACTION (Docket
No. 682) AND MOTION
TO IMPLEMENT (Docket
No. 682)

The United States objects (Docket No. 673) to Magistrate Judge Larson's March 21, 2011 order sustaining Plaintiff Darryl Cherney's Objection to Destruction of Evidence of Who Bombed Judi Bari; granting Cherney's Motion for an Order in Rem Granting Access for Testing and Notice Against Spoliation; and denying the United States's Motion to Strike the Declaration of James Wheaton. The United States moves for de novo review (Docket No. 673). Cherney opposes the objection and, in his opposition, renews his motion to strike the United States's motion for de novo review, which the Court originally denied on April 26, 2011. Cherney also requests action by the Court (Docket No. 682) and moves to implement the Magistrate Judge's Order (Docket No. 683). Having considered all of the papers filed by the parties, the Court grants the United

1 States's motion for de novo review, denies Cherney's renewed motion
2 to strike, overrules the United States's objection to the
3 Magistrate Judge's order, and grants Cherney's request for action
4 and motion to implement. The Court affirms Magistrate Judge
5 Larson's order.

6 BACKGROUND

7 Because Magistrate Judge Larson's order thoroughly describes
8 the procedural and factual history of this case, which was
9 originally filed two decades ago, that history will not be repeated
10 here. As is relevant to this order, Bari and Cherney brought the
11 underlying lawsuit in 1991, alleging that Defendants, including the
12 City of Oakland, the Oakland Police Department (OPD) and several
13 named individual Oakland police officers and FBI agents, conspired
14 to frame them for the May 24, 1990 bombing of Bari's car, in which
15 Bari and Cherney themselves were seriously injured. Later, Bari v.
16 United States, C 93-1899 CW, was consolidated with this case and
17 the caption of the case was changed to "Bari v. United States."
18 The case was tried and the jury reached a verdict for Plaintiffs in
19 2002. Thereafter, the parties engaged in protracted settlement
20 discussions supervised by Magistrate Judge Larson. In April 2004,
21 Bari, through her executor, and Cherney entered into a settlement
22 agreement with Defendants. In addition to monetary relief, the
23 settlement agreement included the following provision:

- 24 2a. Non-monetary relief: The City defendants have stated
25 their intention to release all evidence gathered in the
26 underlying criminal investigation to plaintiffs (save and
27 except for contraband items which plaintiffs would have
28 no lawful authority to possess). This will be reduced to
a writing between the plaintiffs and the City defendants.
The City will itemize any items withheld and the parties

1 will refer any disputes regarding withheld items for
2 resolution to Magistrate Judge Larson.

3 Cherney Ex. 10, Settlement Agreement paragraph 2a.¹

4 On May 14, 2004, Plaintiffs filed a partial satisfaction of
5 judgment, which stated that the individual Federal Defendants had
6 fulfilled the terms of the monetary portion of the settlement
7 agreement. See Docket No. 663-1, May 14, 2004 Partial Satisfaction
8 of Judgment. On June 18, 2004, this Court dismissed the case with
9 prejudice, retaining jurisdiction to enforce the settlement
10 agreement.

11 At some point thereafter, the FBI contacted the Sonoma County
12 Sheriff's Department (SCSD) and the OPD to arrange for the return
13 of evidence the FBI had received from those agencies. Docket No.
14 673, United States's Motion for De Novo Review at 5-6. The SCSD
15 advised the FBI that it did not want the evidence returned to it.
16 Id. at 6. At some later date, there were discussions between the
17 FBI, the OPD and Plaintiffs, after which the FBI acknowledged that
18 it would turn over to the OPD only the non-contraband evidence that
19 the OPD had provided to it and that the OPD would return the
20 evidence to Plaintiffs. Id. On March 25, 2009, the FBI turned
21 over some evidence to the OPD and the OPD simultaneously provided
22 it to Plaintiffs. Id.

23 The following evidence was not turned over to the OPD: the
24 fragments of the device which exploded in Bari's car, a partially-
25 exploded pipe bomb that was found at a Louisiana Pacific lumber

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27 ¹According to the United States, the writing alluded to in
28 this provision was never made.

1 mill in Cloverdale, California; a hand-lettered sign found near the
2 Cloverdale device reading "LP screws mill workers;" a fingerprint
3 obtained from the sign; an analysis of the fingerprint; and a
4 letter to the Santa Rosa Press Democrat newspaper, known as the
5 "Lord's Avenger" letter, by an individual claiming responsibility
6 for the Cloverdale device and the bombing of Bari's car. The
7 Cloverdale device and the sign had originally been obtained by the
8 SCSD, but, as noted, that agency had indicated that it did not want
9 the evidence returned to it. The Lord's Avenger letter was
10 returned to the Santa Rosa Press Democrat, which had originally
11 received it and turned it over to the FBI in 1990.

12 In June 2010, counsel for the United States informed Cherney's
13 counsel that the remaining evidence would be destroyed. Cherney
14 filed the objection and motions described above and noticed them
15 for a hearing before Magistrate Judge Larson. He asked that the
16 evidence not be destroyed but be released for third party testing,
17 either for use in a criminal prosecution or in a civil suit by
18 Cherney. In support of his motion, Cherney attached the
19 declaration of attorney James Wheaton, which addressed the
20 understanding of the parties at the time of the settlement
21 agreement regarding the disposition of the evidence. The United
22 States opposed the motion, arguing that the Court lacked
23 jurisdiction to provide the relief requested by Cherney. The
24 United States also filed a motion before Magistrate Judge Larson to
25 strike the Wheaton declaration as barred by the parol evidence
26 rule. Magistrate Judge Larson held a hearing on September 8, 2010
27 and took the objection and motions under submission.

1 On March 21, 2011, Magistrate Judge Larson issued an order
2 sustaining Cherney's objection to the destruction of the evidence
3 and granting his motions. Magistrate Judge Larson denied the
4 United States's motion to strike the Wheaton declaration, finding
5 that it was admissible to interpret the settlement agreement, which
6 was ambiguous. Magistrate Judge Larson found jurisdiction and
7 ordered:

8 that the United States preserve against loss, alteration,
9 destruction, or contamination all components and remnants of
10 the Oakland and Cloverdale bombs, along with the "LP Screws
11 Millworkers" sign, the "lifted" fingerprints, and any
12 fingerprint analysis; and further orders that the same be
transferred to a reliable third-party custodian, for
examination and testing, when an appropriate custodian is
identified by the Court. Plaintiffs are hereby ordered to
propose such a custodian for the Court's consideration.

13 March 21, 2011 Order at 23.

14 On April 5, 2010, the United States moved for de novo review
15 of Magistrate Judge Larson's order. On April 7, 2010, Cherney
16 moved to strike the United States's motion, arguing that de novo
17 review was unavailable because the United States consented to
18 Magistrate Judge Larson's jurisdiction. On April 26, 2010, this
19 Court denied Cherney's motion to strike. In his opposition to the
20 United States's motion for de novo review, Cherney renews his
21 motion to strike.

22 DISCUSSION

23 I. Cherney's Renewed Motion to Strike

24 In denying Cherney's first motion to strike the United
25 States's motion for de novo review, the Court found that Cherney
26 had not identified a written consent by the United States to
27 Magistrate Judge Larson's jurisdiction, and noted that the referral
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1 to Magistrate Judge Larson was made pursuant to 28 U.S.C.
2 § 636(b)(1)(B). This was incorrect. The referral was made
3 pursuant to Local Rule 72-1, and did not specify any section of
4 § 636. Cherney now renews his motion, citing Roell v. Withrow, 538
5 U.S. 580 (2003), for the proposition that a party may impliedly
6 consent to a magistrate judge's jurisdiction.

7 Roell held that parties could impliedly consent to the
8 jurisdiction of a magistrate judge by appearing before him or her,
9 without expressing reservation, after being notified of their right
10 to refuse and after being told that the magistrate judge intended
11 to exercise case-dispositive authority. Id. at 586. Although the
12 United States appeared before Magistrate Judge Larson without
13 expressing reservation, it was not notified that Magistrate Judge
14 Larson would be entering an order that would not be subject to de
15 novo review or that it had a right to refuse this exercise of
16 jurisdiction.

17 The United States may have consented to Magistrate Judge
18 Larson's jurisdiction in the settlement agreement itself.
19 Paragraph 2a of the settlement agreement provided that "the
20 parties" would refer any disputes regarding withheld evidence to
21 Magistrate Judge Larson. The United States argues that, because
22 the claims against it had been dismissed from the case before trial
23 and it was not mentioned specifically in paragraph 2a, it did not
24 consent to Magistrate Judge Larson's jurisdiction regarding the
25 disposition of the evidence.

26 The settlement agreement uses the term, "parties," without
27 explicitly defining it. Defendants are referred to as "Oakland
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1 Defendants" and "Federal Defendants." Paragraph 1(b) of the
2 settlement agreement defines "Federal Defendants" as "federal
3 defendants and the United States." Together, Plaintiffs and the
4 Oakland and Federal Defendants are referred to as "parties." The
5 settlement agreement is signed by an Assistant United States
6 Attorney on behalf of the "Federal Defendants." Thus, in every
7 section of the settlement agreement where the word, "parties,"
8 appears, the United States is included. There is no reason to
9 interpret the word "parties" in paragraph 2a any differently from
10 the way that word is used in all other paragraphs of the settlement
11 agreement. Thus, the United States appears to be one of the
12 parties who agreed in paragraph 2a to refer any dispute regarding
13 withheld evidence to Magistrate Judge Larson. However, in an
14 abundance of caution, the Court will review Magistrate Judge
15 Larson's order de novo.

16 II. The United States's Objections

17 A. Wheaton Declaration

18 1. Motion to Strike

19 Magistrate Judge Larson denied the United States's motion to
20 strike the declaration of James Wheaton, who served as fee counsel
21 for Plaintiffs in the underlying lawsuit and participated in the
22 settlement negotiations between Plaintiffs and the Oakland and
23 Federal Defendants. The United States argues that Magistrate Judge
24 Larson erred in finding that the settlement agreement was
25 sufficiently ambiguous to allow the use of extrinsic evidence to
26 interpret it.

27 Magistrate Judge Larson found the phrase, "all evidence
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1 gathered in the underlying investigation," contained in paragraph
2 2a of the agreement, susceptible to two interpretations: (1) all
3 the evidence from the underlying criminal investigation, even
4 though the FBI, rather than OPD, was in possession of most of this
5 evidence; or (2) only the evidence the OPD had gathered in the
6 underlying criminal investigation.

7 The United States argues that Magistrate Judge Larson's
8 finding of ambiguity did not take the entire agreement into account
9 and cites Klamath Water Users Protective Ass'n v. Patterson, for
10 the proposition that a "written contract must be read as a whole
11 and every part interpreted with reference to the whole, with
12 preference given to reasonable interpretations." 204 F.3d 1206,
13 1210 (9th Cir. 1999).

14 However, the United States does not indicate how the
15 settlement agreement as a whole explains the contested phrase. The
16 United States does not cite any portions of the agreement that
17 clarify that this phrase refers only to the evidence gathered by
18 the OPD. The Court affirms Magistrate Judge Larson's denial of the
19 United States's motion to strike.

20 2. Claimed Erroneous Factual Finding

21 The United States argues that Magistrate Judge Larson
22 erroneously found that it was understood at the time that the
23 United States would return all evidence in the case to Oakland.
24 According to the United States, the statement by James Wheaton that
25 it was understood that the FBI would return evidence to the "local
26 law enforcement agencies from whence it came" makes clear that the
27 evidence obtained by the SCSD would be returned to that department,
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1 not transferred to the OPD.

2 Although attorney Wheaton did state that the FBI would return
3 the evidence to the local law enforcement agencies that gathered it,
4 he also stated that it was the understanding of the parties that the
5 FBI would transfer "all the evidence" to the OPD, which would
6 transfer it to Cherney. He explained that the reason paragraph 2a
7 did not refer to the FBI in the context of the release of the non-
8 contraband evidence to Plaintiffs was that counsel for the Federal
9 Defendants stated at the time that the underlying investigation was
10 being conducted by the OPD. Wheaton said counsel for the Federal
11 Defendants represented that the evidence the FBI had did not belong
12 to it, but rather to local law enforcement agencies, and that the
13 FBI could only dispose of it by returning it to local law
14 enforcement agencies. Further, the FBI could not destroy it or
15 enter into any agreement with a private party regarding its
16 disposition. Thus, although some of the evidence had been gathered
17 by the SCSD, there was no reason for the Oakland Defendants and
18 Plaintiffs to believe that the FBI would return it to the SCSD,
19 given that the SCSD had provided it to the FBI, and it was the OPD,
20 not the FBI or the SCSD, that had been conducting the investigation.
21 The Court agrees with Magistrate Judge Larson's factual
22 determination that when the Oakland Defendants agreed to turn over
23 all of the evidence, except for contraband, they meant all of the
24 evidence, including that initially in the possession of the FBI,
25 which the parties expected the FBI to turn over to OPD.

26 B. Jurisdiction

27 Magistrate Judge Larson found jurisdiction to enter his March
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1 21, 2011 order on three bases: (1) the Court's jurisdiction to
2 enforce the terms of the parties' settlement agreement;
3 (2) jurisdiction pursuant to Federal Rule of Criminal Procedure
4 41(g); and (3) the Court's inherent equitable authority. The United
5 States disputes each basis and, for the first time, argues that
6 Magistrate Judge Larson's order violates its sovereign immunity.

7 Because neither the FBI nor the United States was mentioned
8 specifically in paragraph 2a of the settlement agreement, the
9 provision that applies to the release of evidence to Plaintiffs and
10 refers disputes to Magistrate Judge Larson, the United States
11 argues that the Court's jurisdiction to enforce this provision of
12 the agreement does not extend to the FBI. Magistrate Judge Larson
13 acknowledged that the FBI and the United States were not mentioned
14 in paragraph 2a of the agreement, but rejected the United States's
15 argument, based on estoppel: "The Government should be estopped
16 from asserting that the Court lacks jurisdiction to supervise the
17 settlement agreement, where the Government, having been party to
18 the three-way settlement negotiations, has not performed an
19 obligation which gave rise to the terms of the agreement." March
20 21, 2011 Order at 14:1-5.

21 The United States does not specifically challenge Magistrate
22 Judge Larson's finding of estoppel. The Court agrees with
23 Magistrate Judge Larson's conclusion that the United States is
24 estopped from arguing lack of jurisdiction to interpret and enforce
25 the settlement agreement, even if it did not agree to Magistrate
26 Judge Larson's jurisdiction. Accordingly, the Court does not
27 address the alternate grounds on which Magistrate Judge Larson

1 based his finding of jurisdiction.

2 The United States further argues that Magistrate Judge
3 Larson's order violates its sovereign immunity because there is no
4 statutory waiver of sovereign immunity allowing for the equitable
5 remedy of preservation of evidence. Because the Court's
6 jurisdiction to enforce the settlement agreement provides a
7 sufficient basis to sustain Magistrate Judge Larson's order as to
8 the disposition of the evidence in this case, the United States's
9 sovereign immunity is not implicated.

10 C. Contraband

11 Magistrate Judge Larson found that it was unnecessary to
12 determine whether the remnants of the Oakland and Cloverdale
13 devices are contraband because Cherney is requesting only that they
14 be transferred to a third party laboratory for testing. The United
15 States contends that this was error because the settlement
16 agreement explicitly excludes contraband from the evidence that was
17 to be transferred to Cherney.

18 The United States cites United States v. Lussier, 128 F.3d
19 1312, 1315 (9th Cir. 1997), as well as several out-of-circuit
20 cases, defining pipe bombs as "destructive devices" under various
21 federal statutes. The United States also cites United States v.
22 Wilson, 472 F.2d 901, 903 (9th Cir. 1972), an appeal of an order
23 suppressing certain explosive devices as evidence in a prosecution,
24 in which the court referred to "pipe bombs, blasting powder, and
25 impact fuses" as contraband.

26 Because the devices in this case are not fully-assembled,
27 functional explosives, but are either partially or fully exploded,

1 Wilson and Lussier are not controlling. The United States claims
2 that the Oakland and Cloverdale devices are contraband per se,
3 which is always illegal to possess. Cherney claims that they are
4 derivative contraband, which is illegal to possess only when used
5 for illegal purposes.

6 Neither Wilson or Lussier addresses a distinction between
7 contraband per se and derivative contraband. However, this
8 distinction is not relevant here because Cherney is not seeking to
9 possess the devices. Cherney states that he is "informed and
10 believe[s]" that the two devices are no longer dangerous because
11 any residual explosive powder has been removed. Cherney Dec. ¶ 5.
12 The United States has not disputed this contention.²

13 The Court affirms Magistrate Judge Larson's ruling that a
14 determination of whether the devices are "contraband" is not
15 necessary because Cherney is requesting only that they be
16 transferred to a third party laboratory for testing.

17 E. Disposition

18 Magistrate Judge Larson ordered that the evidence be preserved
19 and transferred to a reliable third-party testing facility after
20 one is identified by Cherney and approved by the Court. The United
21 States now suggests that, if the Court affirms Magistrate Judge
22 Larson's order, Cherney should not be permitted to direct

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24 ²In addition, the Oakland device apparently consists entirely
25 of fragments. While the United States indicates that the FBI
26 Laboratory Explosives Unit confirmed at the time of the 2004
27 settlement negotiations that "the remains of a partially exploded
28 incendiary device, as was the Cloverdale device, were considered
contraband," Brief at 5, it makes no such statement regarding the
Oakland device. The fragments of an exploded bomb cannot be
considered a "destructive device" at this point.

1 disposition of the evidence. The United States urges the Court to
2 place the responsibility on the Alameda County District Attorney to
3 determine what, if any, further investigation or scientific testing
4 to undertake.

5 The settlement agreement provides no basis for ordering the
6 evidence transferred to the Alameda County District Attorney, nor
7 is there any indication that the District Attorney wants the
8 evidence. In his motion to implement Magistrate Judge Larson's
9 Order, Cherney has identified Forensic Analytical Sciences as the
10 third-party laboratory to receive, test and store the evidence.
11 Cherney shall provide to the Court and to the United States
12 Forensic Analytical Sciences' qualifications, certifications and
13 capabilities, its plan for taking custody, testing and storing the
14 evidence, and a proposed order. If the United States objects to
15 this organization or its procedures, it must, within fourteen days
16 from receipt of Cherney's proposal, explain the basis of its
17 objections and propose an alternate plan for the preservation,
18 testing and storage of the evidence. The United States's plan
19 could propose disassembling the Cloverdale device or removing any
20 explosive powder, if necessary, so that it is not dangerous or
21 contraband. It could propose providing the evidence to the OPD,
22 with the OPD then providing it simultaneously to the third party
23 laboratory. If the United States files an objection or a plan,
24 Cherney may reply within seven days thereafter.


25 CONCLUSION

26 For the foregoing reasons, the United States's motion for de
27 novo review is granted, and its objections are overruled. (Docket

1 No. 673.) Cherney's renewed motion to strike is denied. Cherney's
2 request for action (Docket No. 682) and motion to implement (Docket
3 No. 683) are granted. For the reasons explained in this order,
4 Magistrate Judge Larson's March 21, 2011 Order is affirmed. The
5 parties shall proceed as outlined above.

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7 IT IS SO ORDERED.

8 Dated: 3/31/2012


CLAUDIA WILKEN

United States District Judge